FARAD CONTINUATION SHEET NO.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 4053 OF 2005

Office notes, office Memoranda of appearances, Court's orders or directions & Registrar's orders.	: Coram, : : : :	Court's or Judge's Orders .

Mr. N. M. Apte for petitioner

CORAM: SMT. RANJANA DESAI, J.
12/9/05

P.C.:-

The petitioner is the original defendant tenant in RCS No. 82/03 pending on the file of Small Causes Court Judge, Pune. The respondent is the original plaintiff landlord. The suit is for possession of the tenanted premises.

2. In this suit an application came to be made by the defendant under order 26 Rule 9 of of the Code of Civil Procedure, praying for appointment of court commissioner for local inspection of the tenanted premises and to submit the report in respect of points made in paragraph 3

of the application as A, B & C;

(A) the status and measurement of the balcony leading to the bathroom.

(B) The nature and placement of the main door of the tenanted premises making the tenanted premises an independent dwelling unit/ premises, cutting of the balconies and bathroom from the use and occupation of the outsider. The electrical connections of the balcony, bathroom, it's placement being in the tenanted premises of the plaintiff. That position of the electrical switches also needs to be confirmed which is in the tenanted premises.

(C) The bathroom adjacent to the one-room premises of the plaintiff on the first floor under the use of the plaintiff.

3. This application was heard by the learned Judge on 29/7/04. It appears from the order passed on 29/3/04 that the learned Judge had heard the advocate for the plaintiff

as well as the defendant. After considering the rival submissions the learned Judge has observed as under:-

"While considering this application it reveals that defendant has sought inspection as regards disputed portion in terms of its status, nature and placement which is in dispute. In my opinion, by leading evidence such as maps of the property in dispute said fact cannot be ascertained. Under that circumstances it would be just and reasonable to appoint a court commissioner for ascertaining nature, status and placement of the particular access to the suit property which is in dispute. Under that circumstances I am of the opinion that appointment of the court commissioner be reasonable for the said purpose."

4. The learned Judge then appointed advocate Ms. Hemlata H. Khopade as court commissioner for ascertaining the nature of the suit premises in terms of prayer clauses

made in the application at Exh. 17.

5. It appears that thereafter the court commissioner proceeded with her work. She inspected the suit premises and submitted her report in respect of the points A & B as set out in the application of the petitioner dated 12/4/2004. However, so far as point C is concerned she noted that the plaintiff refused to open the door and, therefore, she could not ascertain the present position at the existing situation as regards point C.

6. The petitioner, therefore, preferred yet another application on 5/1/05 stating that since the plaintiff obstructed the commissioner, the commissioner could not submit her report in respect of point C and, therefore, again a commissioner be appointed and the plaintiff be directed to pay the cost of the commissioner. That application came to be rejected by the learned Judge on 16/3/05. The said order is challenged in this writ petition.

7. I have heard the learned counsel for the petitioner at some length. He has rightly contended that while appointing the commissioner the learned Judge had in his first order stated that by leading evidence such as maps of the property in dispute, the status, nature and placement of the property cannot be ascertained and, therefore, it is just and reasonable to appoint commissioner for ascertaining the same. Though it was pointed out that the plaintiff obstructed the commissioner and hence report could not be submitted, instead of taking serious note of the plaintiff's conduct and appointing commissioner again the learned Judge has merely observed that adverse inference can be drawn against the plaintiff. He rejected the application by observing that it is well settled principle of law that court commissioner cannot be appointed for the collection of evidence. He further observed that the fact which is sought to be ascertained through

the report of the Court Commissioner can be proved by either of the party by leading independent evidence to that effect. According to the learned counsel for the petitioner this observation made by the learned Judge runs counter to his observations made by him in his earlier order.

8. I am entirely in agreement with the learned counsel for the petitioner. When the learned Judge appointed the court commissioner he observed that commissioner's appointment was necessary because by leading evidence it was not possible to ascertain the status of the suit property. It is not understood as to how the same judge can at a later stage observe that appointing commissioner would amount to collecting evidence and that the fact which is sought to be ascertained can be proved by either parties by leading independent evidence. His earlier observation is diametically opposed to the observations which he has made in his order 16/3/05.

9. In the circumstances, in my opinion, in consonance with the first order passed by the learned Judge dated 29/7/04, it is necessary to appoint court commissioner to inspect the suit property and direct him to submit his report in respect of point C in the petitioner's application dated 12/4/04. Considering the conduct of the plaintiff costs will have to be borne by the plaintiff.

10. In this writ petition, notice was issued to the respondent. The notice has been served. The bailiff's report is on record. The bailif has stated that he has served the notice on the defendant and obtained his signature in token thereof. Moreover, the respondent has been served by advocate notice also. Shri R. S. Sarang, advocate's clerk has filed an affidavit to that effect in respect of the service. The defendant has not chosen to remain present in the court nor has he engaged any advocate. It appears, therefore, that he does not

want to contest the matter. In the circumstances, following order is passed;

a) The impugned order dated 16/3/05 is set aside.

b) The trial court shall appoint a commissioner to visit the suit premises and submit his report in respect of point C in the application dated 12/4/04 filed by the petitioner.

c) The costs of the commissioner quantified at Rs.2,000/- would be borne by the plaintiff. The time schedule will be fixed by the learned Judge.

d) If the plaintiff obstructs, the learned Judge shall pass appropriate orders in accordance with law, in the light of prayers made in the application of the petitioner dated 5/1/05.

e) Writ petition is disposed of in the aforestated terms.

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